

FEB 20 1988

JOSEPH F. SPANIOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1987

KOCH REFINING COMPANY, KOCH FUELS, INC.,
 CONOCO INC., MOBIL OIL CORPORATION,
 CHEVRON U.S.A. INC., and TENNECO OIL COMPANY,

Petitioners,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
 PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
 INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
 INCORPORATED, MFA OIL COMPANY, TENNESSEE FARMERS
 COOPERATIVE, MOORE McCORMACK PETROLEUM, INC.,
 GULF STATES OIL & REFINING COMPANY, TEXACO INC.,
 and GETTY REFINING AND MARKETING COMPANY,

*Respondents.*On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit**PETITIONERS' REPLY BRIEF**

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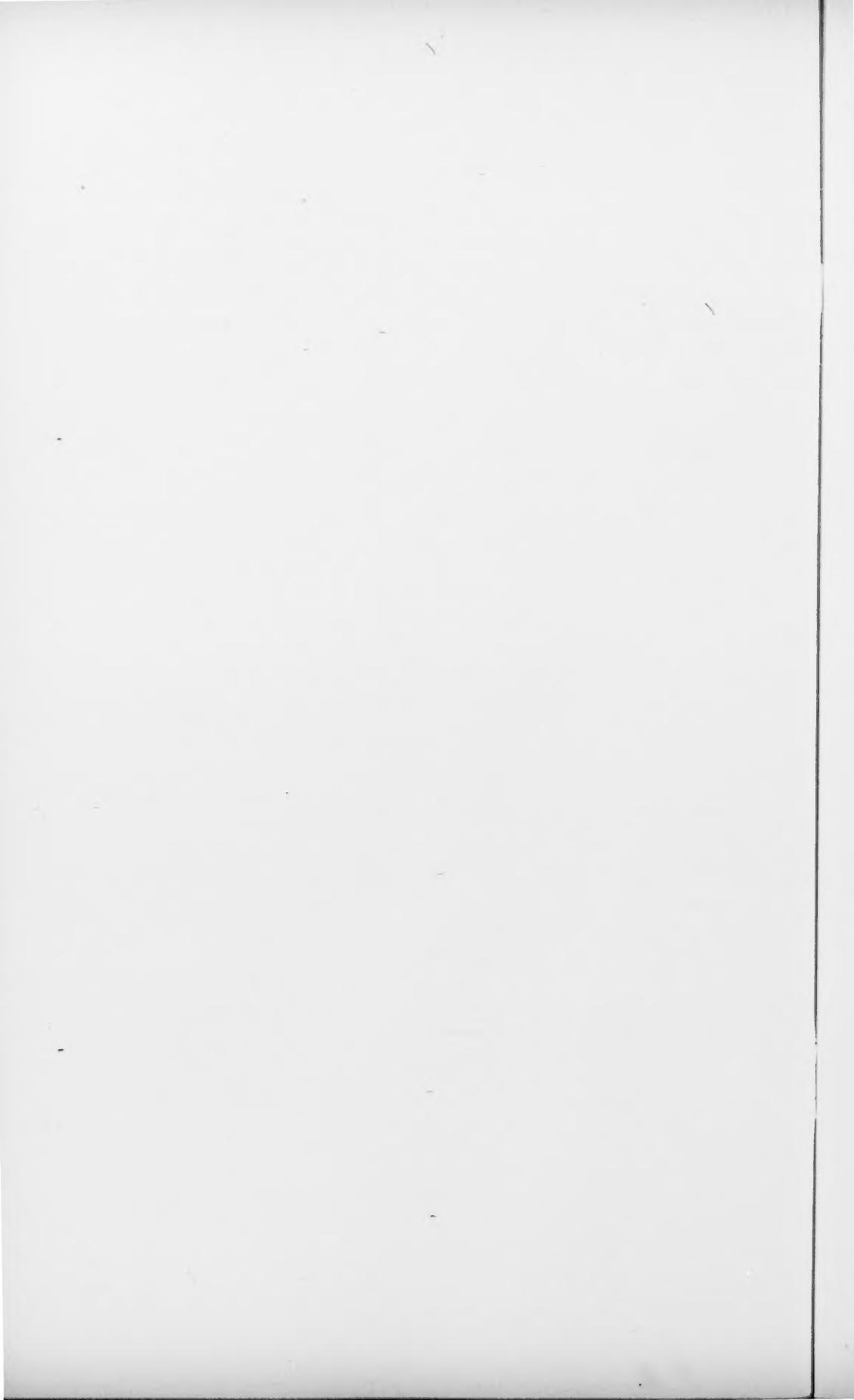
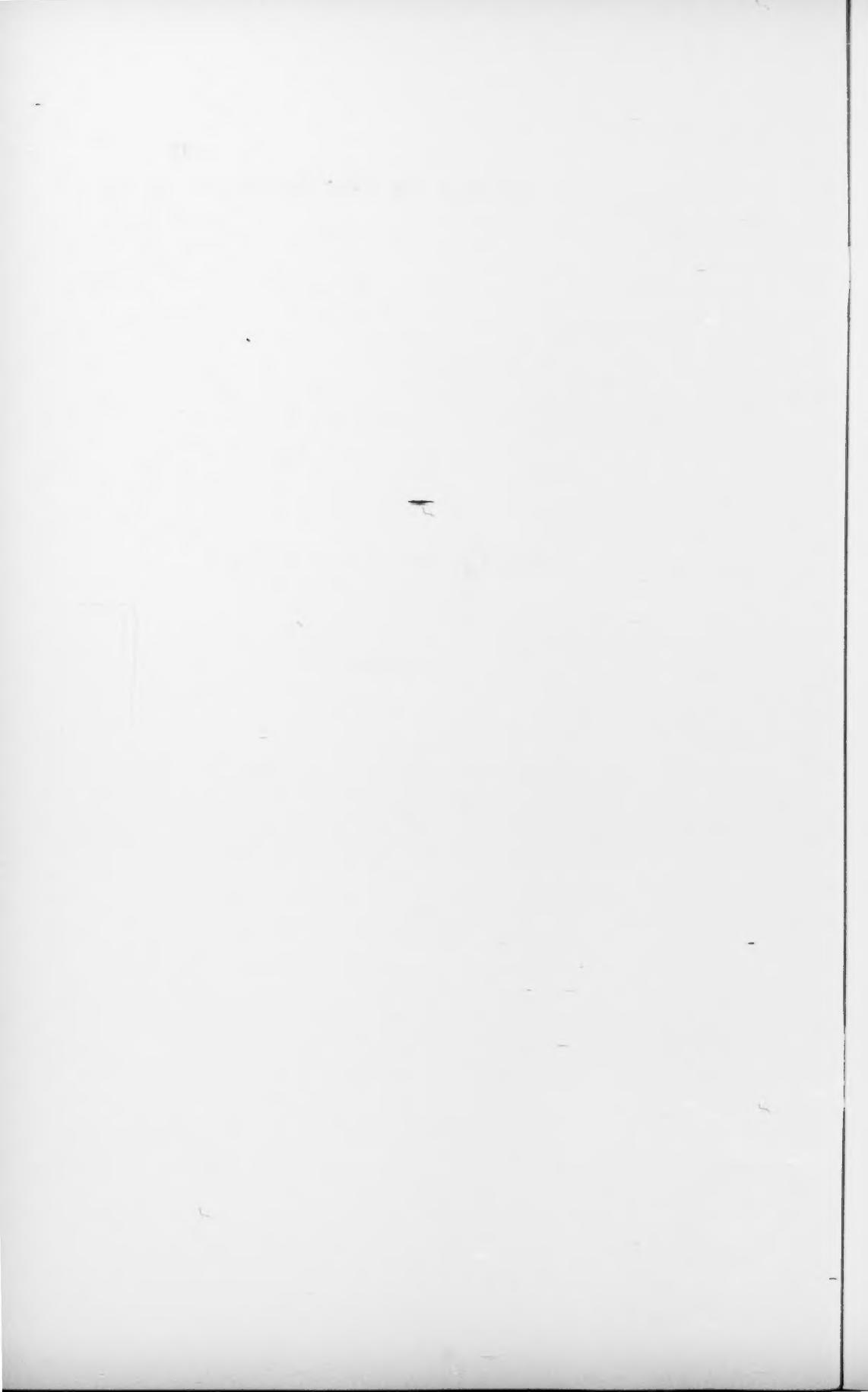


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STATES OIL & REFINING COMPANY, TEXACO INC.,
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PETITIONERS' REPLY BRIEF

ARGUMENT

1. Member-Owner Respondents' arguments in opposition to the petition are erected upon a distorted statement of the decision below: They incorrectly describe the question before the Court of Appeals as whether a trustee in bankruptcy is ". . . permitted to bring a claim to hold the owners of a corporate debtor liable for breach of fidu-

ciary duty and *thereby* to pierce the corporate veil . . ." (Resp. i) (emphasis added). An action against the owners of a corporation for breach of the fiduciary duties they owed the *corporation* has nothing to do with the concept of "piercing the corporate veil" at issue in the courts below.

The gist of an alter ego claim is that the corporation's principals have operated it as a sham and thereby breached their duty to *creditors*. The only issue in this case is whether a bankruptcy trustee can prosecute such an action on behalf of creditors.

2. Nor is it true that the decision below turned on principles of state law. It was irrelevant to the Court of Appeals decision whether, under state law, an alter ego action belonged to the corporation or to creditors. In fact, the Court specifically noted that it did not have to decide that question. (App. A-13 n.7) The Court held that as a matter of *federal* bankruptcy law the Trustee is empowered to assert such a claim on behalf of creditors. (App. A-14) Judge Cudahy succinctly summarizes the holding in his opinion concurring in part and dissenting in part:

. . . The essential theoretical question is whether ECI could ever have maintained an action against its member-owners on the ground that ECI was the alter ego of the owners. Apparently, ECI could not have carried on such an action:

The doctrine of alter ego does not create assets for or in the corporation. It simply fastens liability upon the individual who uses the corporation merely as an instrumentality in the conduct of his own personal business. The liability springs from fraud. The fraud from which it arises is not perpetrated upon the corporation, but upon third persons dealing with the corporation.

Garvin v. Matthews, 193 Wash. 152, 156-57, 74 P.2d 990, 992 (1938) (citations omitted). *Without dealing*

directly with this problem of theory, the majority has concluded that the trustee, in marshalling ECI's assets, may maintain an alter ego action against the member-owners.

Despite the rather basic conceptual problems, policy considerations favoring vesting the action in the trustee encourage a sufficiently broad construction of section 541 to empower the trustee to bring an alter ego action. (App. A-31-32) (Emphasis added)

In short, state law has no bearing whatsoever on the proper construction of Sections 541 or 544, which is exclusively a matter of federal law.

3. Finally, it is simply not true that Petitioners seek review of only one aspect of the Court of Appeals' decision. Member-Owner Respondents characterize the opinion of the Court of Appeals as resting on two entirely independent and self sufficient grounds: one of which it characterizes as springing from principles of ripeness or "Article III standing", and the other as springing from the concept of "prudential standing."

However, the District Court did *not* decide in this case that Petitioners "lacked Article III standing" to maintain their declaratory judgment action against the Member-Owner Respondents. The District Court opined that:

"Status as a creditor or potential creditor is not enough to confer standing upon the plaintiffs. Contrary to the plaintiffs' assertion, standing requires more than a showing of actual or threatened injury. The doctrine of standing also requires that a plaintiff be the proper party to assert the particular legal issue." (App. B-3).

Thus, the District Court disposed of the case purely by deciding that only the trustee and no one else has the legal capacity to assert an alter ego claim, an issue that the Court of Appeals discussed as one of "prudential standing."

In simple terms, the Court of Appeals held that the controversy was not sufficiently adverse or ripe to support a declaratory action (a question the District Court did not decide). It then affirmed the ruling of the District Court on the alter ego question even though that issue was deemed not ripe for ruling. Not only are these rulings not independent they are irreconcilable.

If this petition is denied, the District Court's and Court of Appeals' findings on who is the proper party to bring an alter ego claim will remain intact even though the Court of Appeals has found this very issue not ripe for consideration. The findings below that Petitioners may not assert an action to pierce the corporate veil of ECI because the Trustee of ECI alone has the capacity to do so, will be the law of this case and bar Petitioners from prosecuting such a claim no matter how ripe the controversy may become in the future.

If this Court agrees with the Member-Owner Respondents' contention that the lack of Article III standing was an independent ground of decision which does not warrant review by this Court, the proper disposition is not to deny this petition, but to grant it, to summarily vacate the decisions of the District Court and the Court of Appeals on the "alter ego" question, with directions to dismiss Petitioners' declaratory judgment action without prejudice because the controversy between the Petitioners and the Trustee in the preference action has not yet ripened sufficiently.

The decision of the Court of Appeals now stands as precedent for the proposition that a bankruptcy trustee has the exclusive right to prosecute an action to pierce the corporate veil of the debtor whose estate he represents. Indeed, the Trustee and the Member-Owner Respondents themselves fully appreciate that the Court of Ap-

peals below has decided important and unsettled questions concerning the Trustee's authority to prosecute (and prevent others from prosecuting) alter ego actions. On January 28, 1988 ECI's Trustee and the Member-Owners filed a joint motion in the ECI bankruptcy proceeding for approval of a settlement between them under the terms of which the Trustee would dismiss with prejudice his alter ego claim against the Member-Owners. That settlement proposal is conditioned upon the District Court issuing a permanent injunction against Petitioners and all other creditors and contingent creditors of ECI from filing an alter ego action against the Member-Owners. The Trustee and the District Court could not, of course, afford the Member-Owners such protection if the interpretation of the Bankruptcy Code urged by Petitioners here is correct, and, significantly the settlement proposal pending in the District Court is expressly conditioned on this Court's denial of certiorari in this case.

Thus, a writ of certiorari should issue to the Court of Appeals to review its judgment in this case.

Respectfully submitted,

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